APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

[FILED JUL. 30, 2003]

02-3261

DEBORAH KATZ PUESCHEL,
Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,
Respondent.

Judgment

ON APPEAL from the MERIT SYSTEMS PROTECTION BOARDin CASE NO(S). DC075201 01 56-1-3

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

Per Curiam (CLEVENGER, BRYSON, and DYK, *Circuit Judges*).

AFFIRMED. *See* Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

/s/ Jan Horbaly
JAN HORBALY, Clerk

Dated: Jun. 5, 2003

ISSUED AS A MANDATE: July 28, 2003

Cost Against Petitioner:

Printing $272,24
Total $272.24

APPENDIX B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

[Filed Feb. 7, 2002]

DOCKET NUMBER
DC-0752-01-0156-I-3
Date: February 4, 2002

DEBORAH KATZ-PUESCHEL,
Appellant,

v.

DEPARTMENT OF TRANSPORTATION,
Agency.

George M. Chuzi, Esquire, Washington, D. C., for the appellant.

Mary M McCarth, Esquire, Jamaica, New York, for the agency.

BEFORE

Sherry A. Armstrong
Administrative Judge

INITIAL DECISION

The appellant filed an appeal of the agency's action removing her from Federal employment. As the appellant is a non-probationary employee in the competitive service, the appeal is within the Board's jurisdiction. 5 U.S.C. §§ 7511-7513. For the reasons set forth below, the agency's action is AFFIRMED.

BACKGROUND

The following information is undisputed. Appeal File (AF), Tab 7.[1] The appellant was employed at the Washington Air Route Traffic Control Center (Washington Center) in Leesburg, Virginia, in the position of in the Air Traffic Control Specialist, FG-2152-14. Agency File (Ag. File), Tab 4A. On April 5, 1994, after being advised of a change in work schedule, the appellant left work. She subsequently submitted medical documentation from her physician indicating that she was physically unable to return to work. AF, Tab 4, Agency Exhibit I. The appellant was placed on leave without pay (LWOP) status. She applied for and received benefits from the Department of Labor, Office of Workers' Compensation Programs (OWCP), for the period commencing on April 6, 1994. This is the end of the undisputed information as discussed at the prehearing conference. AF, Tab 7.

With the exception of one date which is contested, it is undisputed that the appellant did not return to work for several years. However, the agency ordered the appellant to report for duty on May 11, 1998. Ag. File, Tab 4N. The appellant was directed to report for a physical on May 11, 1998, and to bring medical documentation regarding her condition with her to that physical. *Id.* The agency informed the appellant that failure to report for work or to bring the required documentation may result in disciplinary action up to and including removal. *Id.* The agency also advised the appellant of her option to apply for disability retirement if she was medically unable to continue her career. It is undisputed that the appellant did not return to work on the date ordered and did not report for the required physical examination. Instead, her attorney submitted a letter to the agency indicating that the appellant was not physically able to return

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[1] Unless otherwise specified, all references to the "Appeal rile" refer to the file docketed as DC-0752-01-0156-I-3.

to duty. Ag. File, Tab 4L. The appellant provided a medical report from Dr. Stephen J. Rojeewicz, Jr., the appellant's psychiatrist, who indicated that he examined the appellant on March 24, 1998, and that he found her unable to return to work. Ag. File, Tab 4M. The physician stated that he could not provide an estimated date for the appellant's return to work and, if "she ever recovers sufficiently to return to work, it is likely that she would have to be assigned to another facility." *Id.* The appellant's counsel submitted another letter on May 18, 1998, in which he informed the agency that the appellant would return to date within 60 days, "if she was medically cleared to do so." Ag. File, Tab 4K. The letter further informed the agency that the appellant had been authorized to receive medical certification examinations from non-FAA personnel and, accordingly, she would undergo the required examination by Dr. Brian Turrisi and would notify the agency of the results of that examination. *Id.* The appellant requested the necessary forms which she contends were never provided. The appellant further requested a daytime shift which would allow her to work weekends and she asked to be assigned to Jacksonville, Florida, because that was where her husband was working. *Id.* The appellant submitted a subsequent letter on June 10, 1998, in which she advised the agency that she would be obtaining an examination from Dr. Turrisi on June 23, 1998, and would report to duty if she was cleared by the physician. Ag. File, Tab 4J. It is undisputed that the appellant never submitted the results of any examination by Dr. Turrisi. It is further undisputed that she never submitted any medical documentation indicating that she was medically cleared for duty.

On September 9, 1998, the agency proposed the appellant's removal based on charges of failure to follow instructions, absence without leave (AWOL), and physical inability to work. Ag. File, Tab 4E. The appellant submitted a written reply. Ag. File, Tab 4C. By decision dated December 23, 1998, the agency sustained the removal action based only on

the charge of physical inability to perform the duties of the position. Ag. File, Tab 4B. While the proposal was pending, the Department of Labor had approved the appellant's application for OWCP benefits. Accordingly, in its final decision regarding the removal action, the agency indicated that it was not pursuing the charges of failure to follow instructions and AWOL because of the OWCP decision approving the appellant's claim for lost wages effective April 6, 1994. *Id.* The appellant was removed effective January 15, 1999. Ag. File, Tabs 4A and 4B. It is undisputed that the appellant continues to receive OWCP benefits. AF, Tab 7.

The parties stipulated prior to hearing that the appellant is medically unable to perform the essential duties of her position.[2] AF, Tabs 7 and 13. However, the appellant asserts that the agency's removal action is not justified by preponderant evidence and does not support the efficiency of the service based on her assertion that she should have been assigned to another position which did not require medical clearance. AF, Tab 7. She contends that harmful procedural error resulted because the agency should have permitted her to buy-back leave and, if she was on leave status, she could not have been removed pursuant to 4wcP regulations. *Id.* The appellant further alleges that the agency's action was based on disability discrimination in that it failed to provide reasonable accommodation for her disabilities. *Id.* Finally, the appellant argues *that the* agency's action was motivated by gender discrimination and reprisal for prior EEO activity. *Id.*

ANALYSIS AND FINDINGS

Legal Standard

The agency must prove by preponderant evidence that the appellant is physically unable to perform the essential func-

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[2] This stipulation was initially reached at the prehearing conference and was subsequently amended to its current reading by the parties immediately prior to hearing. AF, Tabs 7 and 13.

tions of her position, that the removal action promotes the efficiency of the service, and that removal was a reasonable exercise of managerial discretion. *See Lassiter v. Department of Justice,* 60 M.S.P.R. 138 (1993). The appellant has the burden of proving her affirmative defenses by preponderant evidence. 5 C.F.R. § 1201.56(a)(2). Preponderance of the evidence is defined by regulation as the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. *See* 5 C.F.R. § 1201.56(c)(2).

The agency properly charged the appellant with physical inability to perform the essential functions of her position.

As discussed at length above, the appellant left work on April 5, 1994, and subsequently submitted medical documentation indicating that she was unable to return to work. AF, Tab 4, Agency Exhibit 1. The appellant was placed on LWQP status for several years. On May 11, 1998, the agency ordered the appellant to report for duty and for a physical examination. Ag. File, Tab 4N, It is undisputed that the appellant did not return to work on the date ordered and did not report for the required physical examination. Instead, her attorney submitted a letter to the agency indicating that the appellant was not physically able to return to duty which was accompanied by a medical report from the appellant's psychiatrist indicating that she was unable to return to work. Ag. File, Tabs 4L and 4M. The appellant's counsel submitted another letter on May 18, 1998, in which he informed the agency that the appellant would return to duty within 60 days, "if she was medically cleared to do so." Ag. File, Tab 4K. The letter advised the agency that the appellant would undergo a fitness examination by an approved provider and would notify the agency of the results of that examination. *Id.* The appellant submitted a subsequent letter on June 10, 1998, in which she advised the agency that she would be obtaining

this examination on June 23, 1998, and would report to duty if she was cleared by the physician. Ag. File, Tab 4J. It is undisputed that the appellant never submitted the results of any examination by Dr. Turrisi. It is further undisputed that she never submitted any medical documentation indicating that she was medically cleared to return to duty.

Nonetheless, the appellant's counsel argued at hearing that the appellant attempted to return to duty on June 19, 1998, when she came to the agency's facility for a meeting with Mr. Montague and Mr. Myers, the proposing and deciding officials. The appellant's counsel asserted that the appellant told these officials that she would report to work if ordered to do so and she was told that they were not ordering that at this time. Mr. Montague testified that he did not order the appellant to report at that time because he had already ordered her to report on May 11, 1998, and she failed to do so but had submitted a letter from her psychiatrist that she could not work. Accordingly, he stated that he continued her LWOP status. Nonetheless, the appellant's counsel argued at hearing that the appellant was intending to report for work on that date but she was not allowed to do so. Both Mr. Myers and Mr. Montague testified that the appellant did not indicate that she was ready to report for work but, rather, that she continued to maintain that she was not medically cleared for work. Mr. Montague testified that the appellant brought no medical documentation to the meeting indicating her medical status. The appellant had been previously advised in writing by the agency that such information was required when she reported for duty. Ag. File, Tab 4N. Mr. Montague testified that he had no recollection that the appellant made any indication in this meeting that she was prepared to return to work. However, Mr. Myers specifically testified that he had a clear recollection that Mr. Montague asked the appellant whether she was reporting for work on that date and the appellant affirmatively declared that she was not reporting for work at that time. The appellant did not testify at hearing and,

thus, she offered no testimony to refute the testimony of the agency officials. Accordingly, I find no merit to the appellant's argument that she reported for duty on June 19, 1998, but was not permitted to work. By her. own submission, she indicated that she told the agency officials that she would report if ordered which appears to clearly indicate that she did not think she was reporting on that date. AF, Tab S; Ag. File, Tab 41. Further, as noted above, the appellant did not bring . medical documentation which the agency had informed her was required prior to her return. Ag. File, Tab 4N. The appellant offered nothing other than conclusory arguments by her counsel that she reported for duty in June of 1998 and was barred from returning. Accordingly, I find most credible the testimony of the agency officials that the appellant indicated that she was not returning to duty and that she remained unable to work.

Dr. Nicholas Lomangino, Deputy Manager of the Medical Specialties Division, testified that he was asked to review the appellant's medical records and render a professional opinion. Based on his review, he determined that the appellant was qualified to perform the duties of her position. The appellant submitted nothing to the Board to controvert this testimony and, as noted repeatedly herein, the last medical documentation she submitted to the agency indicated that she could not perform work in any capacity. Ag. File, Tab 4M. Nonetheless, I note that the appellant's counsel asserted at hearing that the agency erred in relying on the documentation of the appellant's physician. The appellant cited to an agency policy which provides that "[t]he Flight Surgeon normally will not determine that an [Air Traffic Controller] does not meet medical retention standards solely on the basis of information by the [employee's] own physicians." AF, Tab 11, Appellant's Exhibit J, Chapter 5, Section 51(c), Page 23. However, Dr. Lomangino testified that, where an employee submits unequivocal medical documentation from their physician that they are disqualified from working, the agency will defer to

that finding. Further, the provision cited does not mandate a required agency action as it states what the agency "normally" does in such situations. Id. Finally, the appellant's argument that the agency erred in relying on medical documentation from her physicians that she submitted appears to imply that the information was unreliable because it was not truthful or credible. The appellant offered no basis for that conclusion.

In her reply to the agency's proposed action, the appellant did not indicate that she was ready and able to return to work nor did she request any accommodation. Ag. File, Tab 4C. Further, as noted above, the appellant stipulated that she is unable to perform the duties of an Air Traffic Controller which is the position to which she was assigned. AF, Tab 7. Consequently, for all of these reasons, I find that the agency properly charged the appellant with physical inability to perform the duties of her position.

The appellant failed to prove her affirmative defenses by preponderant evidence.

The appellant alleged several affirmative defenses including gender and disability discrimination, harmful procedural error, and reprisal for protected FF0 activity. The appellant must establish her affirmative defenses by preponderant evidence. 5 C.F.R. § 1201.56(a)(2).

Gender Discrimination: To establish the affirmative defense of gender discrimination, the appellant must show: (a) that she is a member of a protected group; (b) that she suffered an adverse employment action; and (c) that there was a causal connection between her membership in the protected group and the adverse action which she suffered. *See Miller v. Office of Personnel Management*, 59 M,S.P.R. 539, 545 (1993). It is undisputed that the appellant is a Caucasian female *and that* she was removed from Federal employment. Therefore, she is a member of a protected group and suffered an adverse employment action. To establish a causal connec-

tion between her gender and the adverse action, the appellant claimed disparate treatment. To establish discrimination based on disparate treatment, the appellant must show that another employee, who was similarly situated within the same supervisory unit and who committed substantially the same alleged conduct, received a different penalty. *See Stevenson v. Department of Defense*, 55 M.S.P.R. 625, 631 (1992). *See also Bell v. Department of Treasury*, 54 M.S.P.R. 619, 629 (1992). Once the appellant has established a prima facie case, the burden shifts to the agency to articulate a legitimate nondiscriminatory reason for the agency's actions. Finally, once the agency has articulated a legitimate nondiscriminatory reason for its actions, the burden shifts to the appellant to show that the agency's proffered explanation constitutes a pretext for discrimination.

The appellant contends that a white male employee, Edward Day, received OWCP benefits for several years and was not removed. Mr. Day testified at hearing that he was an Air Traffic Controller assigned to the Washington Center but he became physically unable to perform the position and received OWCP benefits. The record reflects that he received OWCP benefits for approximately 4 1/2 years. Mr. Day stated at hearing that he continued to receive OWCP benefits to date and he believed he was still on the agency's rolls. He further testified that he never applied for retirement. However, the agency subsequently submitted an application for retirement under the Civil Service Retirement System signed by Mr. Day on March 7, 1996. AF, Tab 15. The agency further submitted a Standard Form 50 showing that Mr. Day was retired by special option on August 1, 1996. *Id.* Nonetheless, as the appellant correctly argues, an annuitant cannot receive both retirement and OWCP benefits, Mr. Day is apparently still collecting OWCP benefits and not a retirement annuity. AF, Tab 16. However, that does not change the fact that he is considered to be retired from Federal employment. AF, Tab 15.

The appellant and Mr. Day are not similarly situated. While it is true that Mr. Day and the appellant were both physically and/or mentally unable to perform the duties of their position and were receiving OWCP benefits for more than four years, the agency did not propose Mr. Day's removal because Mr. Day applied for retirement and subsequently retired from service. AF, Tab 15. That option was available to the appellant but she apparently chose not to exercise it. Ag. File, Tab 4N. The agency has no need to remove an employee who has applied for retirement. Further, Mr. Day was retired from service on August 1, 1996. The proposing official in this case, Ronald Montague, did not assume responsibility for the Washington Center until April 1997. Thus, he would not have been the proposing official for any action against Mr. Day. The deciding official, Kenneth Myers, was also not in Mr. Day's supervisory chain at the time of his retirement. Mr. Myers testified that he has been the Assistant Air Traffic Manager at Washington Center since April 28, 1998, which is long after Mr. Day retired. Accordingly, the appellant and Mr. Day were not in the same supervisory unit. For all of these reasons, the appellant and Mr. Day are not similarly situated.

The appellant contends that another male employee, James Bryant, was also similarly situated and was treated disparately. It is undisputed that Mr. Bryant became unable to perform the duties of an Air Traffic Controller. The parties stipulated that the agency offered him an alternative work assignment when Mr. Bryant was found medically unable to perform his duties due to insulin-dependent diabetes. AF, Tab 7. However, it is also undisputed that Mr. Bryant did not submit medical documentation to the agency that he could not work in any capacity and he was able to attend work each day which he did on a regular basis. Accordingly, the agency found job duties for him to perform. By contrast, the appellant repeatedly submitted documentation to the agency that she was unable to work in any capacity and she did not report

for work for more than four years prior to the agency's notice of proposed removal. Ag. File, Tab 4M. AF, Tab 4, Agency Exhibits 1 through 3. Further, there is no evidence that Mr. Bryant was found to be disabled from duty by DWCP. The appellant, however, was found completely disabled for years by 4WCP and she collected benefits for the entire period due to her disabling condition. There is no evidence that the appellant ever requested an alternate work assignment nor is there evidence that she was or could have been medically cleared to perform any such position.

I note that the appellant's counsel argued at hearing that the agency should have given her an alternate work assignment despite her medical documentation to the contrary. This will be discussed further below in regard to the appellant's claim of disability discrimination. However, I note here that the appellant contends that the agency's work policies required alternate placement for disabled employees and agency witnesses testified that such assignments were available as Assistant Air Traffic Controllers, also referred to as "A-Side Controllers." However, in this case, the appellant submitted medical documentation in 1994, 1995, and 1998 that she was completely disabled from reporting to duty. Ag. File, Tab 4M. AF, Tall 4, Agency Exhibits 1 through 3. Accordingly, I find no merit to her argument that she should have been assigned to an alternative work assignment. As discussed above, unlike Mr. Bryant, the appellant never reported for work and she submitted medical documentation which specifically provided that she was unable to work in any capacity. *Id.* Accordingly, for all of these reasons, I find that the appellant is not similarly situated to Mr. Bryant. *See Botto v. U.S. Postal Service*, 75 M.S.P.R. 471, 476 (1997) (to be similarly situated, all relevant aspects of the employees' situations must be nearly identical).

Finally, the appellant contends that gender discrimination resulted from a hostile work environment based on sexual

harassment. AF, Tab 7. In particular, the appellant argued in her prehearing submissions that she filed a sexual discrimination and harassment complaint in 1979 and she was subsequently fired during the Air Traffic Controller strike in 1981. AF, Tab 5. The appellant filed an appeal of that action with the Board which reversed the agency's action based on its determination that the appellant's absence from work was justified on medical grounds. *See Kate v. Department of Transportation*, 17 M.S.P.R. 303 (1983). The appellant alleged in her prehearing submission that, upon her return to work, she was subjected to additional harassment. She asserts that the alleged harassment caused her physical disabilities and rendered her unable to perform her job duties. AF, Tab 5.

The appellant has not been at work for several years. She has never performed the duties of her position under the current proposing and deciding officials and, thus, she cannot establish that the current management caused a hostile work environment which prohibited her from performing her duties. However, she argues that harassment occurred prior to leaving the job in 1994. AF, Tab 5. The Board has held that the issues in an appeal where an "employee has been removed for physical inability to perform are whether the employee was able to perform the functions of his position and whether the agency considered accommodation." *See Black v. U.S. Postal Service*, 38 M. S.P.R. 272, 274 (1988); *Schoening v. Department of Transportation*, 34 M.S.P.R. 556, 561 (1987). The Board has expressly held that "[t]he cause or source of the employee's medical condition is irrelevant to those issues." *See Black*, 38 M.S.P.R. at 274. Consequently, I limited evidence at hearing to the appellant's testimony about this issue. However, the appellant declined to testify and, thus, she offered no testimony about a hostile work environment.

In regard to other witnesses requested by the appellant, I note that she requested only witnesses from her work location

to testify about the alleged hostile conditions. AF, Tab 5. The appellant never offered any testimony from a medical professional to establish that her condition was caused by her work environment. *Id.* Thus, even if the cause of the appellant's condition had been relevant to this proceeding and the appellant's other witnesses had been approved, the observations of the appellant's co-workers about alleged hostile working conditions would never serve to establish by preponderant evidence that the work environment caused the appellant's mental or physical condition.

For all of the above reasons, I find that the appellant failed to establish that she was similarly situated to another employee who was treated differently from her due to gender. I further find no evidence of gender discrimination based on a hostile work environment. Therefore, I find that the appellant has failed to establish her affirmative defense of gender discrimination by preponderant evidence.

Disability Discrimination: In the medical documentation submitted to the agency, the appellant's psychiatrist indicated that the appellant suffered from anxiety disorder. Ag. File, Tab 4M. AF, Tab 4, Agency Exhibits 1 through 3. The appellant conceded at the prehearing conference, however, that this condition would not render her disabled within the definition of the Rehabilitation Act. AF, Tab 7. Rather, the appellant contends that the conditions that render her disabled under the Rehabilitation Act include sarcoidosis, asthma, fibromyalgia, and lymphedema. AF, Tab 4, Agency Exhibits 1 through 3, and AF, 7. Ag. File, Tab 4M. *A prima facie* case of disability discrimination generally requires a showing that the appellant is a qualified disabled person under 29 C.F.R. § 1614.203(a)(6); that the action before the Board was based on the disabling condition in question; and, to the extent possible, an articulation by the appellant of a reasonable accommodation. *See Trammell v. Department of Veterans Affairs*, 60 M.S.P.R. 79, 84 (1993); *Yates v. U.S. Postal*

Service, 70 M.S.P.R. 172 (1996). A disabled person is one who has a physical or mental impairment that substantially limits one or more of her major life activities; has a history of such an impairment; or is treated by her employing agency as having such an impairment. 29 C.F.R. § 1614.203(a). *See Trammell*, 60 M.S.P.R. at 84, fn. 2. EEOC regulations define the term "major life activity" as functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1614.203(a)(3). Rather the impairment must generally foreclose the type of employment involved, and constitute a significant barrier to employment. *Id.* The inquiry is whether the impairment constitutes for the employee a significant barrier generally to the type of employment involved. *See Carr v. Department of Defense*, 61 M.S.P.R. 172, 178 (1994).

A disabled person who, with or without reasonable accommodation, can perform the essential functions of her position (or a vacant position to which she could be reassigned) without endangering the health and safety of himself or others, is a "qualified disabled person" entitled to reasonable accommodation by the agency, unless the agency can demonstrate that the accommodation would impose an undue hardship on its operations. 29 C.F.R. § 1614.203(a)(6). *See Trammell*, 60 M.S.P.R. at 84. *See also Savage v. Department of the Navy*, 36 M.S.P.R. 148, 151-152 (1988). An agency's failure to accommodate the known physical limitations of a qualified disabled employee constitutes discrimination on the basis of disability. *Trammell*, 60 M.S.P.R. at 84-5.

I find that the appellant is not a qualified disabled employee. First, the appellant stipulated that she was unable to perform her position of record and she did not identify any vacant positions for which she was qualified and could be assigned. AF, Tabs 7 and 13. The appellant's stipulation that she was unable to perform the duties of an Air Traffic

Controller position was supported by her medical evidence submitted over the years which consistently stated that she was medically unable to perform the duties of her position. Ag. File, Tab 4M. AF, Tab 4, Agency Exhibits 1 through 3. The appellant asserted at the prehearing conference that her conditions of sarcoidosis, asthma, fibromyalgia, and lymphedema required her to take medication which would render her unable to obtain a medical clearance. AF, Tab 7. Although the appellant argued that she could have been reassigned to a position which did not require medical clearance, she submitted no medical documentation supporting that argument and such documentation would have been directly contrary to the documentation she submitted to the agency when she was ordered to report to work. Ag. File, Tab 4M. Moreover, the appellant failed to establish the existence and availability of such a vacant position to which she could have been assigned. The deciding official, Kenneth Myers, testified that "A-Side Controller" positions used to require medical clearance which, as noted above, the appellant did not have. Mr. Myers stated that an arbitrator's decision in 1999 required that a modified "A-Side Controller" position be available which did not require medical clearance. However, this requirement was enacted after the appellant was removed.

At the current time, there is no evidence of any vacancies within the agency to which the appellant could be assigned. Kenneth Myers, the deciding official and Assistant Air Traffic Manager at the Washington Center, testified that there are five Program Analyst vacancies which do not require medical qualifications. However, David Siewert, the Air Traffic Resource Management Branch Manager for the Eastern Region since 1998, testified that, while the facility may desire to fill such positions, there are no vacancies in the Eastern Region which do not require medical certification.[3]

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[3] The Eastern Region includes the Washington Center office.

He stated that all vacancies are approved for staffing through his office and his office has provided no such authorization. Mr. Siewert further stated that the administrative support area has been found to be overstaffed in the Washington Center and that downsizing is occurring. In addition, he testified that, pursuant to Article 17 of the collective bargaining agreement, when support duties are available, the agency is required to use Air Traffic Controllers to perform those duties in order to increase productivity and reduce costs. If any vacancies are to be filled, the contract requires justification as to why vacancies cannot be covered with active Air Traffic Controllers. Mr. Siewert testified that there has been no request for such a showing at the Washington Center. On cross-examination, Mr. Siewert stated that Mr. Myers testimony regarding available positions was erroneous and, because his office was responsible for such positions, he is in a better position to know the staffing requirements. He noted that field managers always want more employees but that does not mean that any authority exists for the hiring of more employees. The appellant submitted nothing to contradict Mr. Siewert's testimony that no vacant positions existed in the Washington Center which did not require medical clearance. The agency has no obligation to create a permanent position where none exists. *See Warren v. Department of Veterans Affairs*, 60 M.S.P.R. 97 (1993). The appellant did not identify any vacant positions for which she was qualified and to which she could be reassigned. *See Trammell*, 60 M.S.P.R. at 88. *See also Battle v. Department of Transportation*, 63 M.S.P.R. 403, 408 (1994). Accordingly, I find that no vacancies exist for which the appellant would be qualified. In addition, I note that, even if vacancies were available, the appellant submitted no medical documentation indicating that she was able to work in any capacity. Further, while not dispositive, I note that the appellant continues to collect OWCP benefits which

is apparently based on her representations and evidence submitted to the Department of Labor indicating that she is unable to work in any capacity. AF, Tab 7.

Further, as noted above, to be a qualified disabled person, the appellant must establish that she has a physical or mental impairment that substantially limits one or more of her major life activities; has a history of such an impairment; or is treated by her employing agency as having such an impairment. 29 C.F.R. § 1614.203(a). *See Trammell*, 60 M.S.P.R. at 84, fn. 2. In this case, the appellant contends that her mental condition renders her unable to perform the duties of an Air Traffic Controller. However, the fact that an impairment prevents an employee from meeting the demands of a particular job does not necessarily mean that the employee is disabled. *See Manuel v. Veterans Affairs*, 58 M.S.P.R. 424, 427-28 (1993); *Cohen v. Department of the Army*, 46 M.S.P.R. 369, 373-74 (1990). Rather, the inquiry is whether the impairment constitutes for the employee a significant barrier generally to the type of employment involved: *See Carr v. Department of Defense*, 61 M.S.P.R. 172, 178 (1994).

In this case, the appellant has established only that she is foreclosed from performing the duties of an Air Traffic Controller due to her mental condition. However, because this is only one job, the appellant has failed to establish that she has a substantial limitation in working. *See Carter v. Department of Justice*, 88 M.S.P.R. 641, 649 (2001), *citing* 29 C.F.R. § 1630.2(j)(3)(i) ("The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working"). *See also Sutton v. United Airlines*, 527 U.S. 471 (1999) (the position of global airline pilot is a single job and, thus, the inability to perform only that job does not establish that the individual is substantially limited in working).

I note that the appellant argued at hearing that another accommodation she sought was reassignment to an Air

Traffic Controller position in Jacksonville, Florida. In her written request to the agency for such an assignment, the only reason given was that her husband was employed in that area. Ag. File, Tab 4K. In his medical statement, the appellant's physician, Dr. Rojcewicz, did indicate that, if the appellant "ever recovers sufficiently to return to work, it is likely that she would have to be assigned to another facility." Ag. File, Tab 4M. However, this was not a request for accommodation as Dr. Rojcewicz indicated that the appellant could not return to work at that time. *Id.* Further, the only justification for such an accommodation was the physician's summary conclusion that the appellant's "association with her previous place of employment causes worsening of the anxiety and mental preoccupations." *Id.* There is no showing as to how the appellant's duty station of record caused her mental condition. Further, an inability to work for a particular supervisor or in a particular position or location does not constitute a disability under the Rehabilitation Act because it is not a barrier to employment and does not foreclose an employee generally from their line of work. *See Bullock v. Department of the Air Force*, 88 M.S.P.R. 531, 539 (2001) *Fitzgerald v. Department of Defense*, 85 M.S.P.R. 463, 468 (2000), *citing* 29 C.F.R. § 1630.2(j)(3)(i); *Vyas v. Department of the Army*, 83 M.S.P.R. 452 (1999); *Sublette v. Department of the Army*, 68 M.S.P.R. 82, 86-88 (1995). Finally, Mr. Myers testified that, to be reassigned as an Air Traffic Controller in another location, the appellant would still have to be found medically able to perform the duties of the position. The only documentation submitted to the agency was the statement from Dr. Rojcewicz that the appellant could not return to work in any capacity. As Mr. Myers correctly stated, reassignment to another location would be inconsistent with the findings of the appellant's physician's that the appellant was precluded from performing the job duties due to her disability.

In sum, based on all of the above, I find that the appellant has failed to establish by preponderant evidence that the action at issue was the result of disability discrimination.

Harmful Procedural Error: The appellant contends that the agency committed several harmful procedural errors in its removal action. The appellant has the burden of proving that the agency committed a procedural error and that the error was harmful, i.e., that the error was likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of an error. 5 C.F.R. 1201.56(c)(3). *See e.g., Bowden v. Department of the Army*, 59 M.S.P.R. 662 (1993). *See also* 5 C.F.R. § 1201.56(a)(2).

The appellant first contends that the agency failed to follow internal regulations requiring the agency to investigate accommodation possibilities for an incapacitated employee. AF, Tab 7. At hearing, appellant's counsel cited to the agency regulation requiring that an Air Traffic Controller who, due to a temporary medical condition, could not perform control duties "shall be placed on administrative duties or leave by air traffic management." AF, Tab 11, Appellant's Exhibit J, Section 3, Paragraph 60(a), Page 27. The regulation further provides that, if a condition is permanent, the agency may effect reassignment to a staff position" or "shall be referred to the Personnel Management Division for placement in. other available positions or for other appropriate personnel actions." *Id.* at Paragraph 60(b). However, these provisions apply solely to those persons who are limited only from performing control duties. AF, Tab 11, Appellant's Exhibit J, Section 3, Page 27. As repeatedly noted herein, the appellant had submitted medical documentation that she could not . report to work in any capacity. Ag. File, Tab 4M. AF, Tab 4, Agency Exhibits 1 through 3. Thus, reassignment to other duties was not an option. One option contained in the cited agency provisions was placing the employee on leave if the condition was temporary. It is undisputed in this case that the

appellant was given long-term LWOP for over four years and was subsequently provided retroactive OWCP benefits. It is undisputed that the appellant had no other leave available and, thus, granting leave in the form of LWOP was an available option and was appropriate given the fact that the appellant had submitted medical documentation indicating that she could not work. *Id.*

The appellant further contends that she was entitled to remain on OWCP benefits for one year prior to separation but contends that she was removed after only four months. AF, Tab 7. As grounds for her argument, the appellant relies on an agency policy stating that the agency will carry OWCP recipients on the agency's rolls for at least one year. Ag. File, Tab 4W This policy further states that it will not ordinarily carry employees in LWGP for more than one year. *Id.*

This provision is inapplicable to this case. First, the provision cited is not an internal agency regulation but, rather, it is simply a statement of agency policy concerning employees who are unavailable for duty on a long-term basis. *Id.* The agency's statement notes therein that the regulations expressly do not require a federal employer to retain an employee who is receiving GWCP benefits. *Id.* Thus, I find that the policy statement at issue constitutes advisory guidance only and does not have the force and effect of an agency regulation. *See Adams v. Department of Transportation*, 15 M.S.P.R. 72, 81 (1983), *aff'd*, 735 F.2d 488 (Fed. Cir. 1984) (guidelines from Attorney General regarding the handling of striking employees was advisory only and did not establish nondiscretionary policy and did not have the effect of a regulatory requirement); *Gertzman v. Immigration and Naturalization Service*, 9 M.S.P.R. 581 (1982) (agency's table of penalties is merely a guide and is not mandatory). *Cf Giesler v. Department of Transportation*, 3 M.S.P.R. 277, 280 (1980), *aff'd*, 686 F.2d 844 (10th Cir. 1982) (provisions

of a collective bargaining agreement establish nondiscretionary policy under which an agency operates and have the effect of regulatory requirements).

Further, even if the provision was a regulation which the agency was required to follow, the parties stipulated that the appellant was on continuation of pay benefits from OWCP from April 6, 1994, through the present. AF, Tab 7. Thus, while part of OWCP's award was retroactively granted, the appellant received OWCP benefits for more than four years prior to her removal. The policy in question states that it affords UWCP recipients one year on the agency's rolls in order to easier accommodate reinstatement should they recover during the one year period. In this case, the agency waited more than four years for the appellant to recover and return to work before taking any action against her and she received OWCP benefits for this entire period. This far exceeds the agency's internal policy of allowing employees one year to recover before facing an adverse action.

The appellant further asserts that the agency was required to follow applicable regulations requiring the agency to grant her request to buy-back leave following approval of her OWCP claim by the Department of Labor. AF, Tab 7. As noted above, the appellant was placed on LWOP status and she was afforded OWCP benefits for the entire period at issue. However, the Department of Labor approval for OWCP benefits was not issued until after the agency issued its notice of proposal removal. Patricia Healey, Manager of the Personnel Services Branch, testified without dispute that, when an employee is approved for OWCP benefits after an extended leave, the employee can apply to buy back leave used after OWCP approves their claim. The appellant contends that, if she had been permitted to buy back annual or sick leave, she could not have been. removed. She relies on 5 C.F.R. § 353.106(b) which provides that an employee absent because of a compensable injury may be placed on LWOP or

separated unless the employee elects to use sick or annual leave. Ms. Healey stated that regulations in earlier years gave the Department of Labor the requisite jurisdiction to approve a request for a leave buy-back but rules in effect at the current time provide the agency with authority to approve or deny such requests.

In this case, it is undisputed that the appellant applied to the Department of Labor to buy-back leave. On December 9, 1999, the Department of Labor notified that appellant that it had determined that she was entitled to leave buyback for 168 hours of annual leave. AF, Tab 4, Agency Exhibit 4. On March 24, 2000, the Department of Labor issued another letter finding that the appellant was also entitled to leave buy-back for 120 hours of sick leave. *Id.* at Agency Exhibit 5. It informed the appellant that she would be required to pay $2138.22 for sick leave and $2993.51 for annual leave. *Id.* The Department of Labor instructed the appellant to submit the paperwork enclosed with its letter if she wished to proceed with leave buy-back. *Id.* Ms. Healey testified without dispute that the appellant did not submit any paperwork to the agency and never rendered payment for the leave buy-back amount.

The appellant submitted information from OWCP regarding leave buy-back procedures. This information provides that, when an employee uses their sick or annual leave to cover an injury-related absence from work, they may elect to receive compensation instead. AF, Tab 11. To have leave reinstated, the employee must refund to the agency the difference between the compensation entitlement and the total amount of leave paid by the agency. *Id.* In this case, however, it is undisputed that the appellant was on LWOP. The information submitted by the appellant specifies that leave is not earned while in LWOP status. *Id.*

During the prehearing conference, I indicated that it appeared that an agency has had the sole discretion to allow or

disallow a leave buyback request since 1991. AF, Tab 7, *citing Burtch v. U.S. Postal Service*, 47 M.S.P.R. 518, 519 fn.2 (1991), *aff'd*, 949 F.2d 404 (Fed. Cir. 1991) (Table) (citing 20 C.F.R. § 10.310(a), the Board noted that the applicable regulation provided in part as follows: "'If the employee uses leave during a period of disability caused by an occupational disease or illness, and a claim of compensation is approved, the employee may, with the approval of the employing agency, `buy back' the used leave and have it recredited to the employee's account.'") The appellant was told during the prehearing conference that, if she deemed that she was not applicable to this case, she must provide a copy of the law on which she was relying. AF, Tab 7. The appellant cited no law, rule, or regulation which provided that the agency lacked discretion as to whether to allow her leave buyback request for the time period in question. Ms. Healey testified that, at one point in the past the agency lacked discretion, but she did not testify as to when the law changed. Based on the Board's case law as cited above which was not refuted by the appellant, it appears that it has been within the agency's discretion since at least 1991. Thus, the agency would have the necessary discretion to deny the appellant's request. Ms. Healey testified without dispute that the purpose of granting such requests is to afford available leave to an employee returning to work after compensable injury. In this case, the appellant has been removed and, unless the agency action is reversed, she would not be returning to the agency.

More importantly, the Department of Labor approval letters authorizing a limited amount of leave buy-back were not issued until after the agency's removal action had become effective. AF, Tab 4, Agency Exhibits 4 and 5. The appellant cited no law, rule, or regulation requiring the agency to maintain the appellant on the agency's rolls pending a decision by the Department of Labor on her leave buy-back request. Finally, even if the appellant had been permitted to buy back 168 hours of annual leave and 120 hours of sick

leave, it is undisputed that she was on LWDP due to compensable injury for over four years. The appellant had no leave available to cover that entire period and she could still have been removed by the agency as physically unable to perform the duties of her position The appellant submitted no evidence or argument as to how the outcome would have been different.

Finally, as noted above, the appellant's counsel asserted at hearing that the agency erred in relying solely on the documentation of the appellant's physician in finding that she was unable to perform the duties of her position. The appellant cited to the agency's internal regulations which provide that "[t]he Flight Surgeon normally will not determine that an [Air Traffic Controller] does not meet medical retention standards solely on the basis of information by the [employee's] own physicians." AF, Tab 11, Appellant's Exhibit J, Chapter 5, Section 51(c), Page 23. To the extent that the appellant asserts that a harmful procedural error resulted in this regard, I find no basis for such a finding. Dr. Lomangino testified that, where an employee submits unequivocal medical documentation from their physician that they are disqualified from working, the agency will defer to that finding. The regulation cited states that the agency will "normally" not rely solely on information by an employee's physician but there is no barrier to the agency doing so in some cases. *Id.* Further, the appellant did not indicate how the outcome in this case would have been different as she submitted nothing to indicate that the information she submitted from her physician was not reliable or that there would have been different findings had she been examined by an agency physician. Moreover, I note that the appellant indicated to the agency that she would not be reviewed by an agency physician as she had an agreement with the agency that she would be reviewed by her private physician. Ag. File,

Tabs 4J and 4K. The appellant stated that she would get an examination from that physician and submit the results to the agency but it is undisputed that nothing was submitted. *Id.*

For all of the reasons discussed above, I find that the appellant failed to establish by preponderant evidence any harmful procedural error.

Reprisal for EEO Complaint: The appellant asserts that the agency's actions were a result of retaliation for protected EEO activity. To establish a *prima facie* case of retaliation for filing an EEO complaint, the appellant must show that: (a) she engaged in protected activity; (b) the accused officials knew of the protected activity; (c) the adverse employment action under review could, under the circumstances, have been retaliation; and (d) a genuine nexus exists between the retaliation and the adverse action. *See Warren v. Department of the Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986). To establish a genuine nexus between the protected activity and the adverse employment action, the appellant must prove that the retaliatory motive was a significant or substantial factor in the taking of the action. *See Ireland v. Department of Health and Human Services*, 34 M.S.P.R. 614, 619 (1987).

In this case, the appellant contends that she filed several EEO complaints due to the alleged discriminatory work environment. AF, Tab 7. One claim was filed on March 25, 1999, and was amended on April 30, 1999, and other claims were filed in 1997. AF, Tab 11. Although the appellant argues that the agency's actions in this case were taken in reprisal for her complaints, the appellant submitted no evidence to establish a nexus between her complaints and the agency's actions. As noted herein, to establish a nexus between the protected activity and the adverse employment action, the appellant must prove that the retaliatory motive was a significant or substantial factor in the taking of the action at issue before the Board. *See Ireland*, 34 M.S.P.R. at 619. Mr. Montague, the proposing official, testified that,

while he may have been aware of the appellant's complaints, he had no specific recollection and he was unaware of any details. Mr. Myers, the deciding official, testified without dispute that he was unaware of any of the appellant's claims against the agency. Both officials indicated that their actions were not in reprisal for any claims the appellant may have filed against the agency. The appellant submitted no evidence to refute these claims. She demonstrated no motive by either of these officials to retaliate against her. The sole fact that the appellant filed such complaints is insufficient to establish that there was a nexus between her complaints and the agency's action. *See Viens-Koretko v. Department of Veterans Affairs*, 53 M.S.P.R. 160, 163-64 (1992). Consequently, I find that the appellant has failed to establish her claim of retaliation by preponderant evidence.

The penalty of removal is appropriate.

An agency may remove an employee from the federal service if she is unable, because of a medical condition, to perform the duties of her position. *See Bullock v. Department of the Air Force*, 88 M.S.P.R. 531, 538 (2001). The Board has consistently held that removal based on physical inability to perform the essential functions of an employee's position promotes the efficiency of the service. *See D'Leo v. Department of the Navy*, 53 M.S.P.R. 44, 51 (1992); *Owens v. Department of the Air Force*, 8 M.S.P.R. 580, 583 (1981), The appellant was absent from duty for over four years and the agency was foreclosed from filling her position. Accordingly, other employees were required to perform her duties for an extremely long period of time. Further, it is undisputed that the appellant is unable to return to her position of record. She submitted no evidence that she is able to return to any position at the agency or that any vacant position even exists for which she is qualified. In addition, the appellant has failed to establish any of her alleged affirmative defenses justifying reversal or mitigation of the penalty. Consequently, I find that

the agency's sustained reason for the appellant's removal promotes the efficiency of the service and it will not be disturbed. *See Wyse v. Department of Transportation*, 39 M.S.P.R. 85, 94 (1988).

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: /s/ Sherry A. Armstrong
SHERRY A. ARMSTRONG
Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is. set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. *See* 5 C.F.R. § 1201.112(a)(5).

NOTICE TO APPELLANT

This initial decision will become final on March 11, 2002, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or the federal courts. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked, faxed, or hand-delivered no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either mailed, faxed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REVIEW

If you disagree with the Board's final decision on discrimination, you may obtain further administrative review by filing a petition with the EEOC no later than 30 calendar days after the date this initial decision becomes final. The address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 19848
Washington, D.C. 20036

JUDICIAL REVIEW

If you do not want to file a petition with the EEOC, you may ask for judicial review of both discrimination and nondiscrimination issues by filing a civil action. If you are asserting a claim under the Civil Rights Act or under the Rehabilitation Act, you must file your appeal with the appropriate United States district court as provided in 42 U.S.C. § 2000e-5. If you file a civil action with the court, you must name the head of the agency as the defendant. *See* 42 U.S.C. § 2000e-16(c). To be timely, your civil action under the Civil Rights Act, 42 U.S.C. § 2000e-16(c) must be filed no later than 30 calendar days after the date this initial decision becomes final. If you are asserting a claim under the Age Discrimination in Employment Act, your claim must be filed with the appropriate United States district court as provided in 29 U.S.C. § 633a(c). In some, but not all districts you may have up to 6 years to file such a civil action. *See* 28 U.S.C. § 2401(a).

If you choose not to contest the Board's decision on discrimination, you may ask for judicial review of the nondiscrimination issues by filing a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court of appeals before this decision becomes final. To be timely, your petition must be received by the court of appeals no later than 60 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

APPENDIX C

CHAPTER 5. RETENTION

SECTION 1. PERIODIC REQUALIFICATION

50. *GENERAL.* The medical standards for retention shall be applied at the time of periodic examination, with concomitant consideration of the functional and operation responsibilities of an ATCS's air traffic control position. Medical standards for retention shall be applied in reinstatement examinations.

51. *MEDICAL EVALUATION PROCEDURES.* When a periodic examination has been completed; the Flight Surgeon shall compare the finding to the medical retention standards.

a. If the ATCS meets retention standards, the Flight Surgeon shall notify the Personnel Management Division (PMD) and facility management that the ATCS is medically qualified for retention.

b. If the ATCS does not meet retention standards a special consideration may be granted in accordance with paragraph 23. If a special consideration is not practicable an employment status review and determination must be made. If the medical condition is diagnosed to be remedied within thirty calendar days, the employment status determination may be made by facility management, all other cases must be determined in accordance with paragraph 60. In all cases the personnel management division will be advised of the ATCS'S status and all determinations.

c. If the ATCS does not meet the retention standards the Flight Surgeon may carry out further medical evaluation including medical tests and laboratory determinations, and medical specialty evaluations by selected physicians or other medical specialists. The Flight Surgeon normally will not determine that an ATCS does not meet medical retention standards solely on the basis of information provided by the ATCSs own physicians.

d. Following further evaluation, the Flight Surgeon shall compare the results to the standards.

(1) If the ATCS meets medical standards, the Flight Surgeon shall notify the Personnel Management Division and facility management that the ATCS is medically qualified for retention.

(2) If, after further evaluation, the ATCS still does not meet retention standards, proceed as in paragraph 51b.

52. *MEDICAL REVIEW PROCEDURES.*

a. The Regional Flight Surgeon shall review the medical record of each medically disqualified ATCS to verify that:

(1) The medical condition is governed by the medical standards,

(2) Where appropriate, medical evaluation has been carried out for the agency.

(3) The objective medical findings support the diagnosis.

(4) The medical evaluation is complete enough to support determinations about qualification status and the granting of special consideration.

(5) The condition is not remediable or remediable within a reasonable length of time.

(6) The Flight Surgeon has conferred with facility management to consider retaining the ATCS in the workforce before reaching a determination.

b. During the review, the Regional Flight Surgeon shall confer with the Air Traffic Division and the Personnel Management Division, to insure that full consideration has been given to retaining the ATCS.

c. Following this review, the Regional-Flight Surgeon shall:

(1) Sustain the decision if he finds satisfactory compliance with the review criteria.

(2) in coordination with the Air Traffic Division Chief, grant special consideration when they determine that a disqualified ATCS 8hOuld be retained.

(3) Reverse the determination when he determines that it is incorrect.

(4) Request additional information or medical evaluation when he determines the need.

d. The Regional Flight Surgeon shall notify the Personnel Management Division, Air Traffic Division, the involved facility chief, and the ATCS of the determination,

e. The Personnel Management Division shall contact the ATCS within one week after notification of the disqualification to provide additional information, outline benefits and procedure8 relating to retirement, placement procedures and other appropriate information.

f. Within 15 days from receipt of notification of disqualification, an ATCS may request review by the Federal Air Surgeon.

g. The Federal Air Surgeon shall review the medical record of a medically disqualified ATCSS to verify that:

(1) The appropriate procedures have been followed.

(2) No additional information is needed.

(3) There are no other factors which must be taken into account.

Following this review, the Federal Air Surgeon shall:

(1) Sustain the decision if he finds satisfactory compliance with the review criteria.

(2) Rescind the medical determination if he determines that it is incorrect.

(3) Request the Regional Flight Surgeon provide additional information.

i. The decision of the Federal Air Surgeon on the appeal shall be the final agency medical determination.

j. If the ATCS remains disqualified, the case shall be referred for administrative review as described in paragraph 60.

SECTION 2. INTERVAL MEDICAL PROBLEMS

53. *IDENTIFICATION.* A medical problem or condition of an ATCS may arise at any time not in connection with the required periodic examination.

A problem may be identified by the ATCS or by facility management.

54. *MEDICAL STATUS DETERMINATION.* The Flight Surgeon shall examine the ATCS or evaluate medical information provided and make a medical determination of the medical status of the ATCS. If the medical condition warrants, the Flight Surgeon may authorize referral examinations for evaluation, and compare all medical findings with established medical standards.

55. *WORK STATUS DETERMINATION.* The air traffic facility management shall assign ATCSS placed in restricted or Incapacitated status to leave or administrative duties. An ATCS who fails to meet standards will be considered as If he/she had failed to meet standards in a periodic evaluation (see paragraph 51). Cases of ATCSs who are determined

to be incapacitated, or the period of recovery will or is anticipated to exceed 30 days, shall be forwarded to the region for review and action (see paragraph 60).

56. *PERIODIC RE-EVALUATION.* ATCSs placed on restriction will be medically reviewed or reevaluated within a period not to exceed every 30 calendar days. If it is determined that the ATCS is recovered, restrictions will be removed and the ATCS returned to duty. ATCSB about whose condition a final determination cannot yet be made may be left in restricted status. If the determination 18 made that the ATCSs medical condition has become indefinitely incapacitating, the case shall be forwarded to the region for review and action (see paragraph 60).

57. *INCAPACITATION.* When there is a determination that an ATCS is incapacitated, the case shall be forwarded to the region for review and action (see paragraph 60). When an ATCS meets the medical standards, but is determined to be indefinitely incapacitated, the procedures outlined in FPM Supplement 831-1, paragraph S10-10, as well as the procedures in this order, shall be followed.

58. *RESERVED.*

SECTION 3. ADMINISTRATIVE REVIEW

60. *EMPLOYMENT STATUS REVIEW AND DETERMINATION.* The employment status of disqualified and/or indefinitely incapacitated employees who request placement consideration will be reviewed by the Air Traffic Division to determine the operational suitability and feasibility of retaining the employee in the ATC system. If the ATCS cannot perform control duties and:

a. The medical condition is temporary, the ATCS shall be placed on administrative duties or leave by air traffic management. The ATCS shall be periodically reevaluated to determine the ATCS medical status. This evaluation will

include an application of standards if appropriate. If it is determined that the medical condition has become permanent, the provisions of paragraph 60b will apply. If the ATCS has recovered (both meet standards and is able to perform control functions) the ATCS shall be reassigned to an available ATCS position. If the ATCS is able to perform control functions but does not meet standards, a special consideration -may be granted in accordance with paragraph 23b.

b. The medical condition is permanent, the Air Traffic Division Chief, may effect reassignment to a staff position (ATCSs permanently assigned to staff positions in some cases are no longer required to meet medical standards). If the ATCS is not reassigned to a staff position, the ATCS shall be referred to the Personnel Management Division for placement in other available positions or for other appropriate personnel actions.

61.-69. *RESERVED.*

APPENDIX D

[75] EDWARD DAY was called as a witness, and having been first duly sworn, was examined and testified as follows:

JUDGE ARMSTRONG: If you would please state your name for the record.

THE WITNESS: My name is Edward Day.

JUDGE ARMSTRONG: D-A-Y?

THE WITNESS: Yes.

JUDGE ARMSTRONG: Okay. Mr. Chuzi?

DIRECT EXAMINATION BY MR. CHUZI:

Q Hi, Mr. Day, how are you?

[76] A Hi, George.

Q Mr. Day, were you an air traffic controller?

A Yes.

Q And for how long were you an air traffic controller?

A Twenty-five years.

Q From when to when?

A From 1968 to 19— I believe it was '93 with a break in service.

Q Okay. A break in service of how long?

A I'll have to do the math. About two years.

Q Did there come a time when you became medically incapacitated to work?

A Yes.

Q When was that?

A I believe it was in 1992.

Q At the time that you became medically incapacitated to work, did you apply for worker compensation benefits?

A Yes, I did, in 1993.

Q At any time after you became medically incapacitated to work, did the FAA approach you about [77] taking an alternative position, other duties other than air traffic controller?

A I was assigned to other duties, yes.

Q What duties were those?

A They were peripheral duties, mostly clerical work for the controllers. I just wasn't permitted—because of medication I was taking at the time, I wasn't permitted to be involved with the handling of live traffic.

Q How did that alternative position arise? Did you ask the FAA for it or did the FAA approach you?

A I submitted the medication I was taking and they advised me I was no long able to handle live traffic.

Q How did you become assigned to the other position?

A I believe as positions became available and other situations where they needed some sort of clerical work in different offices became available, they assigned it to me.

Q Okay. How long did you work at those alternative positions?

[78] A From about December of '92 to March of '93.

Q And then what happened?

A Then I used up—I was required by the Department of Labor to use up my sick leave before I could file for workmen's compensation.

Q Okay.

A Use my sick leave and at that time I filed for worker's comp.

Q And then did you go back to work?

A No, I didn't go back to work.

Q So after '93, you didn't report for duty again?

A After March of '93, I did not go back to work, right.

Q And did there come a time when your worker compensation claim was approved?

A Yes. Approximately 20 months later roughly.

Q Did there ever come a time, Mr. Day, when the Agency separated you, removed you in any way?

A No, I was never removed.

Q What is your current status?

A I'm a retired air traffic controller on worker's compensation.

[79] Q Had you ever applied for ATCS retirement?

A No. But to the best of my understanding I am eligible.

Q But you have never applied?

A No, it hasn't been necessary. I've been receiving the worker's compensation and you are forbidden to apply for both simultaneously. That's my understanding.

Q Okay. Do you receive checks every month?

A Yes, I do.

Q And who are those checks from?

A The Department of Labor.

MR. CHUZI: That is all I have, your Honor.

Thank you. Ms. McCarthy has some questions for you.

THE WITNESS: Sure.

MS. McCARTHY: No questions, your Honor.

Standard Form 50-B
Rev. 7/91
U.S. Office of Personnel Management
5 CFR Parts 296-33, 410.4

NOTIFICATION OF PERSONNEL ACTION

1. Name (Last, First, Middle)	2. Social Security Number	3. Date of Birth	4. Effective Date
DAY, EDWARD JR 25853	[redacted]	[redacted]	08-01-96

FIRST ACTION

5-A. Code	5-B. Nature of Action
303	RETIREMENT - SPECIAL OPTION
5-C. Code	**5-D. Legal Authority**
ZLM	SEE REMARKS BELOW
5-E. Code	**5-F. Legal Authority**

SECOND ACTION

6-A. Code	6-B. Nature of Action
6-C. Code	**6-D. Legal Authority**
6-E. Code	**6-F. Legal Authority**

7. FROM: Position Title and Number	15. TO: Position Title and Number
AIR TRAFFIC CONTROL SPECIALIST (CNTR) PD NO=EA-C519.83 BU NO=EAAT0086 ORG=EACC11 CST CNTR=2101	

8. Pay Plan	9. Occ. Code	10. Grade/Level	11. Step/Rate	12. Total Salary	13. Pay Basis	16. Pay Plan	17. Occ. Code	18. Grade/Level	19. Step/Rate	20. Total Salary/Award	21. Pay Basis
GS	2152	14	09	$79,134	PA						

12A. Basic Pay	12B. Locality Adj.	12C. Adj. Basic Pay	12D. Other Pay	20A. Basic Pay	20B. Locality Adj.	20C. Adj. Basic Pay	20D. Other Pay
$74,627	$4,507	$79,134	$0				

14. Name and Location of Position's Organization	22. Name and Location of Position's Organization
EASTERN REGION FED BLDG, JFK ARPT, JAMAICA, NY 11430 AIR TRAFFIC DIVISION WASHINGTON CENTER	

EMPLOYEE DATA

23. Veterans Preference	24. Tenure	25. Agency Use	26. Veterans Preference for RIF
1 : None 2 : 5-Point 3 : 10-Point/Disability 4 : 10-Point/Compensable 5 : 10-Point/Other	0 : None 1 : Permanent 2 : Conditional 3 : Indefinite		YES [ ] NO [X]

27. FEGLI	28. Annuitant Indicator	29. Pay Rate Determinant
B WAIVED LIFE INSURANCE	9 NOT APPLICABLE	0

30. Retirement Plan	31. Service Comp. Date (Leave)	32. Work Schedule	33. Part-Time Hours Per Biweekly Pay Period
1 CSRS	07-02-71	F	

POSITION DATA

34. Position Occupied	35. FLSA Category	36. Appropriation Code	37. Bargaining Unit Status
1 : Competitive Service 2 : Excepted Service 3 : SES General 4 : SES Career Reserved	E : Exempt N : Nonexempt	SEE REMARKS BELOW	0061

38. Duty Station Code	39. Duty Station (City - County - State or Overseas Location)
51-1440-107	LEESBURG, LOUDOUN, VA

40. AGENCY DATA	41.	42.	43.	44.
SP PROG=00	SUPV CSC=8	POS TYPE=1		POSITION SENSITIVITY = 2

45. Remarks

APPROP = 601 .0 /000/110 /2101 /1111
SALARY IN BLOCK 12C INCLUDES A LOCALITY-BASED PAYMENT OF 6.04%. EMPLOYEE ELIGIBLE FOR TRUE TIME AND ONE HALF OVERTIME COMPENSATION. ATC POSITION COVERED BY 5 USC 2109 FOR EARLY RETIREMENT PURPOSES. EMPLOYEE ELECTED TO CONTINUE HEALTH BENEFITS COVERAGE IN ENROLLMENT PLAN CODE V82. FWD ADDRES = [redacted] LUMP-SUM PAYMENT TO BE MADE FOR ANY UNUSED ANNUAL LEAVE. SF-8 ISSUED TO EMPLOYEE.
RETIRED IN ORDER TO OBTAIN RETIREMENT BENEFITS

47. Employing Department or Agency	50. Signature / Authority
DEPARTMENT OF TRANSPORTATION/FAA	Sandra LaBrasseur
48. Agency Code	**49. Personnel Office ID**
TD-03	1517
51. Approved Date	**52. Title**
07-22-96	PERSONNEL STAFFING SPEC

TURN OVER FOR IMPORTANT INFORMATION
SF-50-B Part 1

Editions Prior to 7/91 Are Not Usable After 6/30/93
NSN 7540-01-333-6238

BEST AVAILABLE COPY

CSRS

CERTIFIED SUMMARY OF FEDERAL SERVICE
CIVIL SERVICE RETIREMENT SYSTEM

U.S. Office of Personnel Management

Information for Agency

1. A certified copy of this form must accompany the employee's Application for Immediate Retirement (SF 2801) or an Application for Death Benefits (SF 2800) for a deceased employee if a survivor annuity appears to be payable.
2. This form may also be used:
   - for retirement counseling purposes
   - to respond to an employee's request for a record of creditable service.
3. See FPM Supplement 830-1 for detailed instructions for completion and disposition of this form.

Instructions for the Employee

1. Your employing office will complete and certify this form f you.
2. Review this form carefully. Be sure it contains all of yo service.
3. Complete Section E, Employee's Certification, and return it your employing office.

Section A - Identification

1. Name of employee (Last, first, middle initial)	2. Date of birth (Month, day, year)	3. Social Security Number
Day, Edward Jr.	[redacted]	[redacted]
4. List all other names used (Maiden name, AKA, spelling variants)	**5. Other birth dates used**	**6. Military Serial Number**
N/A	N/A	N/A
	7. Service computation date for retirement purposes	
	7-3-71	

8a. Does the applicant receive military retired pay?

- ☐ YES Attach a copy of the applicant's military retired pay order, if available and complete 8b.
- ☐ NO

8b. If YES, has the applicant waived military retired pay to credit military service for ci service retirement?

- ☐ YES Attach a copy of the military finance center's letter to the employee accepting waiver, if available
- ☐ NO *(Includes cases where a waiver is unnecessary)*

Section B - Verified Service History Documented in Official Records

Federal Agency or Military Service Branch	Appointment, Separation, or Conversion Dates for Civilian and Active Honorable Military Service		Name of Retirement System* (e.g., CSRS, CSRS Offset, etc.)	Remarks and Non-Creditable Time (Indicate if service is Part-Time)
	From	To		
DOT/FAA	5-6-68	07-01-71	CSRS	
	8-28-77	3-10-92	CSRS	
	3-11-92	8-1-96	CSRS	OWCP

* Give details of creditable civilian service not subject to retirement deductions in Section C.